

***United States Court of Appeals
for the Second Circuit***



APPENDIX

74-2545

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Docket No. 74-2545

FLOZELL JONES, Administrator of the
Estate of Dennis Jones, Decedent,

Plaintiff/Appellant

vs.

KEITH MARSHALL,

Defendant/Appellee

JOINT APPENDIX

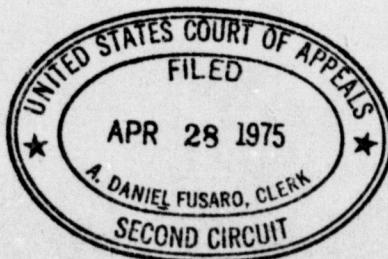
Robert Pelgrift
90 Brainard Road
Hartford, Connecticut

Counsel for Appellee

Bruce Mayor
190 Trumbull Street
Hartford, Connecticut

Louis Parley
University of Connecticut
Legal Clinic
West Hartford, Connecticut

Counsel for Appellant



3

INDEX

	Page
Index to Record on Appeal	1 - 2
Ruling on Cross Motions for Summary Judgment	3 -11
Summary Judgment	12
Stipulation of Facts	13 -16
Amendment to Stipulations	17
Further Amendments to Stipulations	18

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

FLOZELL JONES, Administrator of the	:	
Estate of Dennis Jones, Decedent	:	
	:	
VS.	:	CIVIL NO. 13,811
	:	
KEITH MARSHALL, Officer, West Hartford	:	
Police Department	:	

INDEX TO RECORD ON APPEAL

DOCUMENT NO.

Copy of Docket Entries	A
Complaint	1
Motion For Permission to Appear in this Court for the Case of Flozen Jones vs. Town of West Hartford, et al	2
Marshal's return on Service of Writ	3
Appearance of Robert Y. Pelgrift	4
Motion For Enlargement Pursuant to Rule 6(b)	5
Request for Deposit of Bond with Surety	6
Motion Pursuant to Rule 21 of the F.R.C.P. to Drop Flozell Jones, Individually, as a Party-Plaintiff	7
Request For Production of Documents Pursuant to Rule 34 F.R.C.P.	8
Interrogatories to Defendant Keith Marshal	9
Objection to Requested Production of Documents Pursuant to Rule 34 of the F.R.C. P.	10
Interrogatories to Defendant William Rush	11
Request for Production of Documents Pursuant to Rule 34 F.R.C.P.	12
Bond for Surety	13
Objection to Interrogatories	14
Request for Entry of Default	15
Affidavit of Bruce Mayor	16
Motion For More Definite Statement	17
Answers to Interrogatories re Co-Defendant Keith Marshal	18
Motion to Set Aside Default	19
Interrogatories to Defendant Richard Custer	20

Request for Production of Documents Pursuant to Rule 34, F.R.C.P.	21
Interrogatories to Defendant Town of West Hartford	22
Request for Production of Documents Pursuant to Rule 34, F.R.C.P.	23
Stipulation filed September 14, 1970	24
Response to Motion For More Definite Statement	25
Answer of Defendant Keith Marshall	26
Election and Demand For Jury Trial	27
Defendant William Rush's Motion To Dismiss	28
Defendant Richard Custer's Motion to Dismiss	29
Defendant Town of West Hartford's Motion to Dismiss	30
Answers to Interrogatories to Defendant Town of West Hartford	31
Answers to Interrogatories to Defendant Richard Custer	32
Answers to Interrogatories to Defendant William Rush	33
Ruling on Motion to Dismiss	34
Designation made under Section 7-465	35
Appearance of Louis Parley	36
Amended Answer of Defendant Keith Marshall	37
Appearance of Edwin Gordon Hebb, Jr.	38
Stipulation Relating to the Taking of Depositions By The Plaintiff Pursuant to Rule 30(b)(4)	39
Motion to Withdraw Appearance	40
Stipulation of Facts	41
Withdrawal of the Second, Third, Fourth and Fifth Causes of Action	42
Motion For Summary Judgment by Defendant	43
Motion For Summary Judgment by Plaintiff	44
Amendment to Stipulations	45
Further Amendments to Stipulations	46
Ruling on Cross Motions For Summary Judgment	47
Summary Judgment	48
Motion To Proceed in Forma Pauperis- Order thereon	49
Affidavit of Flozell Jones	50
Notice of Appeal	51
Clerk's Certificate	52

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

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U.S. DISTRICT COURT
HARTFORD, CONN.

FLOZELL JONES, Individually :
and as Administrator of the :
Estate of Dennis Jones, :
Decedent :

v. :

CIVIL NO. 13,811

KEITH MARSHALL, Officer, :
West Hartford Police :
Department :

RULING ON CROSS MOTIONS FOR SUMMARY JUDGMENT

This is an action for damages for the death of Dennis Jones that has been brought by his father as administrator of his estate. The defendant, Officer Keith Marshall of the West Hartford Police Department, who shot and killed Jones, is alleged thereby to have deprived the decedent of his civil rights under color of state law.^{1/} 42 U.S.C. § 1983 (1970). Jurisdiction is proper under 28 U.S.C. § 1343(3) (1970). The parties have filed cross motions for summary judgment based upon the following basic facts to which they have stipulated.

^{1/} The complaint originally named as defendants Marshall; the Town of West Hartford; William Rush, Chief of the West Hartford Police; and Richard Custer, West Hartford Town Manager. The causes of action against all but Keith Marshall were dismissed by order of this Court, Jones v. Marshall, Civ. No. 13,811 (D. Conn. 1971), and a claim of negligence against Marshall was subsequently withdrawn by the plaintiff, leaving the § 1983 claim against Marshall as the sole cause of action.

I. Facts

On August 29, 1969, at approximately noon, Officer Marshall, while on patrol in his cruiser, observed a Cadillac being driven by three males, later identified as Russell Seals, Jr., Raymond Arter, and Dennis Jones. Through radio contact with the West Hartford Police Headquarters, Marshall learned that the automobile was a stolen vehicle and began follow it. Marshall made no attempt to stop the car and did not activate his siren or flasher. The Police Headquarters radioed him that assistance from the Hartford Police Department was on the way.

The Cadillac and Marshall proceeded for some time in Hartford at a moderate pace. However, when the Cadillac entered Mark Twain Drive from Dillon Road it accelerated to about 80 miles per hour and proceeded, with Marshall in pursuit, onto Mark Twain Extension. At the end of the Extension the Cadillac and the police cruiser skidded to a halt, creating a large cloud of dust.

Marshall alighted from his cruiser with his weapon drawn. Since the occupants of the Cadillac were not immediately visible, Marshall climbed to the top of a nearby embankment, and from that point he observed two males running across an open field. He called to them to halt. They did so momentarily and turned to face him; then they turned and began to run away from Marshall toward a nearby wooded area.

Without firing a warning shot or attempting any further means of apprehension, Marshall fired his gun at one of them, Dennis Jones. Although Marshall aimed at Jones' leg, the bullet struck the decedent in the left buttock and then penetrated the left ilium and lacerated the left common iliac artery, peritoneum, massentery, and jejunum, causing death. At the time, Marshall was 125 feet from Jones; the intervening distance can be characterized as rough terrain containing a gully and covered with bushes and underbrush.

Neither Jones nor the other individuals in the Cadillac was armed or specifically threatened physical injury in any manner to Officer Marshall or anyone else. The automobile pursuit did not endanger anyone other than the occupants of the two cars.

Officer Marshall actually and reasonably believed that Jones was a felony suspect. Theft of a motor vehicle was defined by state law as a felony at the time these events occurred. Conn. Gen. Stat. § 53-57. Marshall actually and reasonably believed that it was necessary under the circumstances to use deadly force to apprehend and arrest Jones.

II. Civil Liability and the Constitutional Claim

If this case had been brought as a wrongful death action in state court, there could have been no recovery: Marshall, on the stipulated facts, would have been privileged to shoot at Jones. In Martyn v. Donlin, 151 Conn. 402 (1964),

a police officer (Donlin) chased and shot one whom he reasonably believed to be a felon (Martyn) when Martyn ignored the officer's order to stop and climbed over a fence. Finding that Donlin had a reasonable belief that the use of deadly force was necessary to effect the arrest, the court declined to hold him liable for Martyn's death. The case states the Connecticut common law principles:^{2/}

"Under our rule, in effecting a legal arrest, the arresting officer may . . . use such force as he reasonably believes to be necessary, under all the circumstances surrounding its use, to accomplish that purpose, that is, to effect the arrest and prevent an escape. . . . But the use of a means, or of force, likely to cause death, as was the case here, is privileged only if the arrest was for a felony and the force used was reasonably believed to be necessary to effect that arrest. . . .

". . . .

". . . An officer in using deadly force for this purpose must act in good faith. He must have actually believed, and also have had reasonable cause to believe, that it was necessary under the circumstances, to use deadly force to make the arrest." ^{3/}

These common law principles, if constitutional, are applicable here: in Pierson v. Ray, 386 U.S. 547 (1967), suit under § 1983 for damages for false imprisonment, the Court emphasized that the section "should be read against background of tort liability" and recognized the common law

^{2/}

Although there are variations of this rule in some states, the Martyn formulation is representative of the common law rule.

^{3/}

151 Conn. at 411-12.

- 5 -

privilege of a police officer to make an arrest, in good faith and with probable cause, of one whose innocence is later proved. Similarly, this Court must allow Marshall to use the common law privilege enunciated by Martyn v. Donlin as a shield against liability unless that common law privilege itself be unconstitutional. Cf. Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970); Clark v. Ziedonis, 368 F. Supp. 544 (E.D. Wis. 1973); Love v. Davis, 353 F. Supp. 587 (W.D. La. 1972).

The plaintiff does not challenge any of these principles as embodied in Connecticut's law other than that element which extends the privilege to use deadly force to attempt to effect an arrest for an offense that did not pose the risk of death or serious bodily harm. As to this element, the plaintiff contends that the proposed limitations on the use of deadly force, as stated in the Model Penal Code, are constitutionally required. With regard to the instant case, the relevant subsections in that code provide:

"(b) The use of deadly force is not justifiable under this Section unless:

.....

- (iv) the actor believes that:
- (1) the crime for which the arrest is made involved conduct including the use or threatened use of deadly force; or
 - (2) there is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed." 4/

4/

Model Penal Code § 3.07(2)(b)(iv) (proposed official draft 1962).

The basis for the plaintiff's contention lies in p arguments that allowing the use of deadly force in circum stances such as those of this case is "illogical, antequa [sic] and barbaric." Reduced to its essence the argument that allowing life to be taken to protect property is bar in our modern world, where only jail sentences and fines prescribed as punishments for crimes against property. I arguing that "[t]he balance [between the value of a suspe life and the threat he poses to society] against life tha exists in the common law rule is reversed," the plaintiff relies upon language that appears in the opinions in Furman v. Georgia, 408 U.S. 238 (1972). Furman provides no suppo for that proposition, however. The case cannot be explain as founded upon an overriding reverence for human life. Furman does not hold that imposition of the death penalty unconstitutional. Rather, the key to Furman is only its insistence that in the imposition of the death penalty pro cedures which allow the wide discretion to triers heretofor employed are not permissible. Cf. Note, "Discretion and t Constitutionality of the New Death Penalty Statutes," 87 H L. Rev. 1690 (1974).

In his argument the plaintiff also relies upon John v. Glick, 481 F.2d 1028 (2d Cir. 1973), which sets up as a criterion for § 1983 actions which seek damages for person injuries at the hands of state officials the "shock-the-conscience" test of Rochin v. California, 342 U.S. 165 (19

The plaintiff's contention is that if that criterion is applied the Martyn rule falls on the wrong side of the line. However, language in Johnson itself proves that the plaintiff has misread its scope: "Certainly the constitutional protection is nowhere nearly so extensive as that afforded by the common law tort action for battery, which makes actionable any intentional and unpermitted contact with the plaintiff's person" 481 F.2d at 1033. In the present case, of course, the plaintiff could not recover in tort at common law, for Marshall under the common law was privileged under the circumstances to fire at Jones.

It is noteworthy that during the course of the recent codification and substantial revision of Connecticut's criminal laws, which effort used the Model Penal Code as a guide, the Martyn rule was retained and codified.^{5/} The Court

^{5/} Conn. Gen. Stat. § 53a-22 provides, in pertinent part:

"Sec. 53a-22. Use of physical force in making arrest or preventing escape.

(a) For purposes of this section, a reasonable belief that a person has committed an offense means a reasonable belief in facts or circumstances which if true would in law constitute an offense. If the believed facts or circumstances would not in law constitute an offense, an erroneous though not unreasonable belief that the law is otherwise does not render justifiable the use of physical force to make an arrest or to prevent an escape from custody. A peace officer who is effecting an arrest pursuant to a warrant is justified in using the physical force prescribed in subsections (b) and (c) unless such warrant is invalid and is known by such officer to be invalid.

[Footnote continued on following page.]

regards this legislative assessment of the balance between life and property values, occurring as it did after the event here in question took place, as strong evidence that the common law rule is not [redacted] which is generally regarded as shocking to the conscience [redacted] violate the Constitution. While there is no doubt that a contrary view exists and it has much to support it, it is not the prerogative of this Court to judge the constitutionality of state laws on policy grounds alone, as the plaintiff would essentially have it. If the plaintiff believes the state law on the use of deadly force to effect an arrest to be unjust or overly harsh, it is to the legislature, and not the federal courts, that he must turn. The plaintiff's motion for summary judgment is

5/ cont'd

(b) Except as provided in subsection (a), a peace officer is justified in using reasonable physical force upon another person when and to the extent that he reasonably believes it necessary to: (1) Effect an arrest or to prevent the escape from custody of a person whom he reasonably believes to have committed an offense, unless he knows that the arrest or custody is unauthorized; or (2) defend himself or a third person from the use or imminent use of physical force while effecting or attempting to effect an arrest or while preventing or attempting to prevent an escape.

(c) A peace officer is justified in using deadly physical force upon another person for the purposes specified in subsection (b) only when he reasonably believes that such is necessary to: (1) Defend himself or a third person from the use or imminent use of deadly physical force; or (2) effect an arrest or to prevent the escape from custody of a person whom he reasonably believes has committed or attempted to commit a felony." (Emphasis in original.)

denied, and the defendant's motion for summary judgment is granted.

SO ORDERED.

Dated at Hartford, Connecticut, this 7th day of October, 1974.

M. Joseph Blumenfeld
M. Joseph Blumenfeld
United States District Judge

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U.S. DISTRICT COURT
NEW HAVEN, CONN.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

FLOZELL JONES, Individually)
and as Administrator of the)
Estate of Dennis Jones,)
Decedent)

v.)

KEITH MARSHALL, Officer,)
West Hartford Police)
Department)

Civil No. 13,811

SUMMARY JUDGMENT

This cause having come on for consideration on cross-motions for summary judgment and the Court having rendered its Ruling on Cross Motions for Summary Judgment under date of October 8, 1974, denying plaintiff's motion for summary judgment and granting defendant's motion for summary judgment,

It is ORDERED and ADJUDGED that summary judgment be and is hereby entered in favor of the defendant and that this action be and is hereby dismissed, with costs to the defendant.

Dated at New Haven, Connecticut, this 9th day of October, 1974.

SYLVESTER A. MARKOWSKI
CLERK, UNITED STATES DISTRICT COURT

By

James J. Connelley
Deputy In Charge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

FLOZELL JONES, Individually and as
Administrator of the Estate of
Dennis Jones, Decedent

Plaintiff

vs.

Civil Action No. 13,811

OFFICER KEITH MARSHALL, ET AL

Defendants

STIPULATION OF FACTS

The parties hereby stipulate to the facts contained herein and stipulate to their use by the Court in determining their cross motions for summary judgment.

1. On August 29, 1969, at approximately noon, Officer Keith Marshall of the West Hartford Police Department, while on patrol in a police cruiser, and in the course of the performance of his duties, observed a Cadillac automobile occupied by three Negro males, later identified as Russell Seals, Jr., Raymond Arter and Dennis Jones, all of Hartford, Connecticut, proceeding in a westerly direction on Simsbury Road in West Hartford, in the vicinity of the Hartford Golf Club.

2. Officer Marshall, through radio contact with the West Hartford Police Headquarters received information that the automobile was a stolen vehicle and began to follow the automobile.

3. Officer Marshall continued to follow the car which drove through the Golf Club, onto Norwood Road, through a stop sign on Norwood to Albany Avenue. At Albany it stopped for traffic and then turned left on Albany, headed for Hartford.

After crossing the Hartford town line, the car turned left at Mark Twain Drive, and headed in a northerly direction. The car then turned right onto Dillon Road, and then cricled back onto Mark Twain Drive, once again heading north.

4. While following the car, Officer Marshall did not activate his siren or warning light.

5. During the course of following the car, Officer Marshall did not make any attempt to cause the cadillac to come to a stop.

6. The following of the cadillac from Simsbury Road until Mark Twain Drive was not a "high-speed automobile chase". Prior to re-entering Mark Twain Drive, the cadillac had not exceeded 35-40 miles per hour nor had it violated any traffic regulations.

7. While following the cadillac, Officer Marshall learned by radio that assistance from the Hartford Police Department was on the way.

8. At the point that the cadillac re-entered Mark Twain Drive from Dillon Road, it accellerated to about 80 miles per hour driving northerly on Mark Twain Drive and entering onto the Mark Twain extension, at the end of wh it skidded to a halt.

9. Upon arriving at the point at which the cadillac had stopped, Officer Marshall skidded to a halt and alighted from his cruiser with his weapon drawn. The braking of both cars had created a large cloud of dust.

10. Since the occupants of the car were not immediately visible, Officer Marshall climbed to the top of the embankment. From that point he observed two men running across an open field. He called at them to halt. T momentarily turned to face him. They then turned and began to run away from Officer Marshall towards a nearby wooded area. Without firing a warning shot or attempting any further means of apprehension Officer Marshall fired his gu at Dennis Jones.

11. Officer Marshall aimed at the decedent's leg. The bullet however struck the decedent in the left buttock and then penetrated through the left ilium and lacerated the left common iliac artery, peritoneum, messentery and jejunum, causing death.

12. Officer Marshall was 125 feet from Dennis Jones when he fired the shot that caused the decedent's death. The distance between Officer Marshall and the decedent can be characterized as a rough terrain containing a gully and covered with bushes and underbrush.

13. Neither Dennis Jones or any of the other individuals in the cadillac was armed or specifically threatened physical injury in any manner to Officer Marshall or any other individual. The automobile pursuit did not endanger any other individual other than the occupants.

14. Theft of a Motor Vehicle, Conn. Gen. Stat. §53-47, was a felony offense at the time of the incidents in this case.

15. Russell Seals, Jr. and Raymond Arter, both minors of approximately 16 years of age, were arrested by Hartford Officers on the next day. Neither of them was charged with a felony. The charges against one were ultimately dropped. The other plead guilty to a misdemeanor charge receiving a suspended sentence.

16. Connecticut common law allows police officers to use deadly force to effect the arrest of a person they reasonably believe to be a fleeing felon if there is reasonable cause to believe that the use of deadly force is necessary under the circumstances to make the arrest; shooting is allowed if the officer reasonably believes that the arrest cannot otherwise be effected. Martin v. Donlin, 198 A. 2d 706, 151 Conn. 402 (1964).

17. West Hartford Police Department Training Bulletin, dated October 27, 1967 provided the following instructions:

Stealing a motor vehicle is a felony but shooting at a car that is carried on your verified list or just given out, is the wrong thing to do. You do not know who is in this car and why. It could even be the owner. Most times it is some kid, who, if caught, is turned over the juvenile courts, or if a little older, is charged with taking a motor vehicle without permission, a misdemeanor.

Deadly force should be restricted to the apprehension of perpetrators who, in the course of the crime threatened the use of deadly force, or if the officer believes there is a substantial risk that the person whose arrest is sought will cause death or serious bodily harm if his apprehension is delayed...

Officers should not be permitted to fire at felony suspects when lesser force could be used, when the officer believes that the suspect can be apprehended reasonably soon thereafter without the use of deadly force...

Respectfully submitted,

PLAINTIFF,

Bruce Mayor, Esquire
190 Trumbull Street
Hartford, CT 06103

DEFENDANTS,

BY
Robert Y. Pelgrift, Esquire
Pelgrift, Byrne, Buck & Connolly
Old Mountain Road
Farmington, CT 06032

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

FLOZELL JONES, individually and as
Administrator of the Estate of
Dennis Jones, Decedent

Plaintiff

vs.

Civil Action No. 13, S11

KEITH MARSHALL

Defendant

August 15, 1974

AMENDMENT TO STIPULATIONS

1. Marshall actually believed that it was necessary under the circumstances to use deadly force to make the arrest.

Respectfully submitted,

PLAINTIFF,

Bruce Mayor

Bruce Mayor, Esquire
190 Trumbull Street
Hartford, Connecticut 06103

DEFENDANT,

By *Robert Y. Pelgrift*

Robert Y. Pelgrift, Esquire
Pelgrift, Byrne, Buck & Connolly
Old Mountain Road
Farmington, Connecticut 06032

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

FLOZELL JONES, individually and as
Administrator of the Estate of
Dennis Jones, Decedent

Plaintiff

vs.

Civil Action No. 13,811

KEITH MARSHALL

Defendant

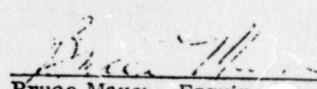
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FURTHER AMENDMENTS TO STIPULATIONS

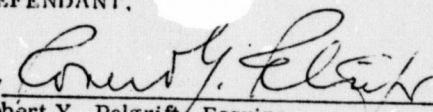
1. It was reasonable for Marshall to believe, that in order to make the arrest, it was necessary to use deadly force.
2. Marshall believed that the Defendant was a felony suspect.
3. It was reasonable for Marshall to believe that the Defendant was a felony suspect.

Respectfully submitted,

PLAINTIFF,


Bruce Mayor, Esquire
190 Trumbull Street
Hartford, Connecticut 06103

DEFENDANT,

By 
Robert Y. Pelgrift, Esquire
Pelgrift, Byrne, Buck & Connolly
Old Mountain Road
Farmington, Connecticut 06032